Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Interpretation of the Telephone Consumer	)	CG Docket No. 18-152
Protection Act in light of the D.C. Circuit's	)	CG Docket No. 18-152
ACA International Decision	)	
	)	June 13, 2018

COMMENTS OF SELENE FINANCE LP

I. Introduction

Selene Finance LP ("Selene") is a Houston based residential mortgage services company that has extensive experience in all aspects of mortgage loan servicing with an emphasis on specialty servicing of severely delinquent and high risk loans. Selene was founded in 2007, and it provides creative loan resolution strategies designed to preserve homeownership. Since its inception, Selene has focused on providing a flexible portfolio management approach to ensure that client goals are met and exceeded. Selene uses proprietary technology combined with unmatched customer service to propose flexible and creative servicing strategies to address the different needs of nonperforming, re-performing, REO, and performing loans. Selene is a Ginnie Mae approved issuer, and one of only two approved subservicers. Selene currently services more than 63,000 residential mortgage loans under various servicing agreements.

Along with other mortgage servicers, Selene has been negatively impacted by the FCC's most recent declaratory rulings regarding the Telephone Consumer Practices Act (TCPA) and believes that the FCC's current interpretations have resulted in a variety unintended consequences including, but not limited to, increased litigation costs for non-telemarketing companies, added customer service challenges, and additional regulatory uncertainty that hinders the ability to develop effective internal policies and procedures to best ensure compliance with the TCPA. When the TCPA was initially enacted, its focus was to deter unwanted telemarketing calls from being made to cell phones but today, only a small fraction of the TCPA litigation is brought against abusive third party telemarketers. The TCPA as currently interpreted has morphed into a source of litigation for consumer advocate attorneys who target a much broader range of businesses that are communicating with customers with whom they have an existing business relationship not for the purpose of consumer relief but rather as a source of revenue. Today, a significant portion of TCPA litigation is being brought against non-telemarketing companies that have an existing relationship with the consumer(s) they call.

There are also competing regulatory requirements in the mortgage servicing industry that can create potential conflicts in complying with the TCPA as it is currently interpreted. Both federal and state mortgage servicing rules require mortgage servicers to contact delinquent customers within specific timeframes in an effort to avoid foreclosure. The Bureau of Consumer Financial Protection (BCFP), Federal Housing Administration and GSEs including Fannie Mae and Freddie Mac each have rules or requirements requiring early intervention which include outbound outreach calls to homeowners.

[1]These mortgage servicing rules and requirements are intended to benefit consumers, yet the FCC Order discourages a primary and efficient means of providing that benefit and negatively impacting homeowners that are struggling financially. The FCC's recent rulings on the TCPA have made the loss of a home or difficulties in resolving a delinquency more likely. Additionally, due to the restrictions on customer communication imposed by the TCPA, mortgage servicers may not be able to effectively communicate and provide assistance with their customers during natural disasters like those recently experienced in California, Florida, Puerto Rico, and Texas.

While the TCPA has become more complicated and far reaching, more and more Americans are abandoning traditional landline phones in their homes and mobile phones are the sole types of phones used by a majority of consumers. According to a June 6, 2018 article from the LA Times, 53.9% of U.S. households now rely exclusively on cell phones. As such, Selene felt it necessary to provide a formal comment to the above referenced FCC Public Notice request[2].

II. Summary

- The TCPA should be strictly interpreted and focused on deterring unwanted telemarketing calls from callers who do not have an existing relationship with the consumer being called.

- A clear definition for "automatic telephone dialing system" (ATDS) should be limited to the following: (1) dialing from a list does not constitute an autodialer; and (2) to be considered an ATDS, the technology needs to automatically generate a phone number in random or sequential order *and* call the number generated without any human interaction.

- The FCC should develop a reassigned wireless number database and provide safe harbor protections from unintentional TCPA violations when callers have taken reasonable steps to ensure the correct number is called when calling existing customers.

- The FCC should clarify the definition of "any reasonable means" to allow a companies to establish and require reasonable steps for a consumer to take in order to revoke their prior expressed consent.

- Federal government contractors should not be considered "persons" for purposes of the TCPA when they are collecting a debt on behalf of the federal government.

- The TCPA should not address call limits for federal debt collectors since there are other state and federal laws that already regulate communication from debt collectors, and which afford consumer protections that offer relief from these communications.

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[1] *See* 12 CFR § 1024.39 (2017), HUD Single Family Housing Policy Handbook 4000.1, Telephone Contact Efforts, p.588 (2016), Fannie Mae Single Family Servicing Guide pg.157, 305-307, (2018).

[2] Public Notice Seeking Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, FCC 18-493, CG Docket No. 18-152 & 02-278, FCC (2018).

III. Responses to Questions for Comment

1. Selene's proposed definitions for what constitutes an "ATDS" and "capacity":

The FCC's most recent interpretation of what constitutes an "automatic telephone dialing system" (ATDS) has made communication with existing customers more costly and cumbersome for mortgage servicers to ensure adherence with the Telephone Consumer Practices Act (TCPA). It has also hindered the industry's ability to take advantage of available compliance technologies that have been specifically designed to facilitate better service to existing customers. As an example, to avoid an ATDS compliance issue an entity would need to expose a consumer to further risk of harm by requiring calls to be performed outside of a system that could enforce statutory protections (e.g. do not call requests, state and federal debt collection call frequency and time limitation, or allow for the recording and monitoring of calls). As such, Selene believes that a better approach for the FCC to follow would be to limit the definition of an ATDS to only include "any computerized system that is used to generate phone numbers in random or sequential order, and then automatically calls the number generated without any human interaction". If equipment by itself cannot dial random or sequential numbers, then it should not be considered an ATDS, and the TCPA's statutory prohibition should not apply.

In light of the court's guidance in ACA v. FCC, Selene also believes that the FCC should focus on how technology is being used, instead of one based on a system's potential ability when determining what constitutes "capacity".[3] As noted in the DC Court of Appeals ruling, under the FCC's most recent interpretation of "capacity", even calls made from a smart phone could be considered to be made from an "automatic telephone dialing system". Using a present tense "capacity" definition that requires a current ability to make automatic calls without any human interaction would be a more reasonable and ascertainable approach. If the ability to make automatic calls has been "turned off", or is otherwise not utilized then equipment and/or out bound calls cannot be made without human intervention then it should be excluded from the definition of ATDS as there would not be a present capacity for the system to generate and make automatic calls. It is important to note that several recent court rulings have already adopted this same type of distinction.[4]

Lastly, Selene requests that any new definition of an ATDS that is ultimately adopted by the FCC also distinguish between calls made to a consumer with an existing relationship and unsolicited cold calls that are made by a third party telemarketer. A computerized system that generates phone numbers from a list of existing customers with whom a company has an ongoing business relationship with should be excluded from any definition of what constitutes an ATDS. These types of equipment are primarily used as compliance tools and to help ensure misdialed numbers are avoided (which can also lead to a TCPA violation).

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[3] *See ACA Int'l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

[4] *See Arora v. Transworld Systems Inc*., 2017 WL 3620742, (N.D.ILL. Aug. 23, 2017)., *Pozo v. Stellar Revovery Collection Agency, Inc*., 2016 WL 7851415, (M.D. Fla. Sept. 2, 2016)., *Carlisle v. Green Tree Servicing, LLC*, l:15–CV–2332–TWT, 2016 WL 4011238, (N.D. Ga. July 27, 2016)., *Frejya v. Dun Bradst*, 2015 WL 6163590, (C.D. Cal. Oct. 14, 2015)., *Derby v. AOL, Inc*., 2015 WL 5316403, (N.D. Cal. Sept. 11, 2015).

2. **Selene's proposed changes to how the FCC should handle calls that are made to reassigned wireless numbers:**

As previously noted by the FCC, roughly 35 million telephones are disconnected and reassigned annually. However, a single comprehensive federal database for companies to use to cross reference a customer's phone number and identify when a number has been reassigned to another user has not yet been developed. Furthermore, existing commercial databases currently do not provide callers with sufficient resources for them to ensure correct parties are being called. As such, it remains virtually impossible to know whether or not an outbound call will violate the TCPA because the caller can never know with certainty who they are calling, and/or whether or not the number called will be to a landline or wireless number.

To address these concerns, Selene requests that FCC develop or cause to be developed a reassigned wireless number database and provide safe harbor protections for companies that have taken reasonable steps to ensure correct numbers for existing customers are being called. Selene believes that implementing these measures are a common sense solution that will not only facilitate TCPA compliance but also provide the industry with much needed piece of mind against unnecessary and very costly class action law suits. Until those attempting to contact an existing customer have a reasonable means to avoid non-compliance with a phone number reassignment, we would ask that the FCC consider expanding the exemption from liability for those entities making a good faith effort to conform to these protections.

3. **Selene's proposed changes to how a called party may revoke prior express consent:**

Currently, the FCC provides that a called party can revoke consent "at any time, and by any reasonable means", "including orally or in writing". Additionally, the FCC also prohibits a company from establishing specific ways that a customer can revoke their prior expressed consent. Selene believes that the FCC's current interpretation for what constitutes "reasonable means" for revoking expressed consent is overly broad, fraught with confusion and presents an unreasonable risk for ensuring compliance which encourages frivolous litigation. Selene believes that a better approach would be to allow a companies to establish and require "reasonable steps" for a consumer to take in order to revoke their prior expressed consent that would include, but not be limited to, providing a consumer with multiple options when they want to revoke their prior expressed consent. Selene also supports prohibiting companies from using intentionally deceptive methods for revocation and would recommend that the FCC include this prohibition along with the above recommended change.

Lastly, Selene also believes that a company that has an existing relationship with a consumer should be able to designate an address for a consumer to seek relief under the TCPA. Entities like Selene have infrastructure in place to support this type of protocol as regulations under the Real Estate Settlement Procedures Act (RESPA)[5] prescribes how an address for consumer inquiries or complaints should be designated and communicated to the consumer. Further, any such communication is then subject to statutory timeframes to address the consumer correspondence and would provide a further framework to ensure a timely

[5] *See* Regulations for Real Estate Settlement Procedures (Regulation X) 12 CFR. § 1024.1 et seq.

resolution and response to any relief sought under TCPA. Oversight of compliance for RESPA is conducted by state and federal regulators, agencies and GSEs, and is a standard for the entity enterprise level control environment. Allowing entities to utilize existing operational and control structures will help promote a more immediate and consistent application of the relief contemplated under the TCPA, while also helping to address industry concerns about consistently capturing verbal revocation requests and defending against allegations that an existing customer verbally revoked consent years before litigation is initiated. By allowing businesses to establish reasonable requirements for consumers to revoke their consent, it will help prevent frivolous law suits against otherwise law abiding businesses while also providing a more structured and less confusing process for consumers to follow.

4. Selene's recommendation for how government contractors should be treated under the TCPA:

On November 2, 2015, Congress amended the TCPA to exclude collection calls "made solely to collect a debt owed to or guaranteed by the United States." [6] As mentioned above, Selene is a Ginnie Mae approved issuer, and one of only two approved subservicers. Ginnie Mae is a corporation wholly owned by the United States within the Department of Housing and Urban Development (HUD). In some instances, Ginnie Mae loans are guaranteed by the federal government while in other instances they may even become owned by the federal government. The principal activity of Ginnie Mae is the administration of its mortgage backed securities ("MBS") program under Section 306(g) of the National Housing Act, 12 U.S.C. § 1721(g). Through the MBS program, Ginnie Mae guarantees the timely payment of principal and interest on securities issued by mortgage lenders ("Issuers"). Ginnie Mae guarantees that holders of the MBS will receive timely payment of principal and interest, and Ginnie Mae's guaranty is backed by the full faith and credit of the United States. In exchange for its guarantee, Ginnie Mae requires Issuers to assign their Ginnie Mae backed mortgages to Ginnie Mae. Ginnie Mae then permits the Issuers to hold legal title and service the mortgage loans on its behalf. When an Issuer defaults Ginnie Mae takes legal title of those mortgage loans that are affected by the Issuer default. [7]

In its July 10, 2015 declaratory ruling, the FCC ruled that the federal government was not a "person" as defined under the TCPA, and therefore exempt from liability under the statute.[8] The FCC also held that federal government contractors would be exempt from liability under the same federal government exemption so long as they were acting within the scope of authority "validly conferred" by the federal government. Therefore, under this interpretation, Ginnie Mae would be exempt from the TCPA if collection calls were made by Ginnie Mae,

[6] *See* 47 U.S.C. § 227(b)(1)(A)(iii); Bipartisan Budget Act, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588 (2015).

[7] *See*, e.g., *United States v. NBD Bank*, 922 F. Supp. 1235 (E.D. Mich. 1996); Ginnie Mae, Mortgage-Back Securities (MBS) Guide (October 16, 2016), available at: MBSGuideLib.aspx; Office of the Inspector General Federal Housing Finance Agency, History of the Government *Sponsored Enterprises, available at* http://fhfaoig.gov/Content/Files/History%20of%20the%20 Government%20Sponsored%20Enterprises.pdf.

[8] *See* In The Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd.8017 (2015).

rather than by a subservicer acting on its behalf. As such, Selene believes that when these same activities are performed by a subservicer acting on behalf of Ginnie Mae, the same exemption should apply. Otherwise, the exemption provided to Ginnie Mae under the TCPA would be meaningless.

Additionally, Selene believes as a general rule, that the TCPA should not apply to federal government contractors who are attempting to collect a debt on behalf of the Federal Government because the TCPA should be strictly interpreted and focused on deterring unwanted telemarketing calls. Furthermore, Selene believes that anyone who is collecting a debt on behalf of the federal government should be considered a government contractor for purposes of the TCPA. Lastly, Selene also believes that a government contractor should qualify for the same "non-person" exemption that is afforded to the federal government through their performance of these services under an active contract with the federal government.

5. Selene's recommendation for the call limits that were implemented in the 2016 Federal Debt Collection Rules:

As stated above, Selene believes that as a general rule, the TCPA should be strictly interpreted and focused on deterring unwanted telemarketing calls from callers who do not have an existing relationship with the consumer being called. Furthermore Selene does not believe that the TCPA should address how often non-telemarketers should be able to call individuals who are being called in an attempt to collect a debt on behalf of the federal government because debt collection calls are already regulated under the Fair Debt Collection Practices Act (FDCPA)[9]. Under the FDCPA, debt collectors are prohibited from making repeated and/or continuous calls intended to annoy, abuse, or harass debtors. Many states also have their own debt collection laws that regulate how debt collection calls can be made. As such, Selene does not believe that the FCC should attempt to regulate debt collection calls from federal debt collectors within the TCPA.

IV. Conclusion

We are truly grateful for the opportunity to share our concerns and suggestions for improving the TCPA and are hopeful that the FCC will take into consideration the issues and suggestions that Selene has addressed above before making any future changes with regard to TCPA compliance.

Selene believes that due to the most recent changes by the FCC regarding TCPA compliance, some businesses, like Selene, are now forced to choose between making legally required calls to their customers or facing frivolous TCPA lawsuits and/or violating competing regulations. The TCPA has also created a chilling effect on valuable communication between businesses and their customers. Unfortunately, due to the unintended litigious atmosphere that has been created by recent guidance from the FCC, Selene (like other consumer facing companies) has become very apprehensive about engaging in direct communication with its consumers due to the current litigious atmosphere created by the TCPA.

[9] *See* Fair Debt Collection Practices Act, Pub. L. 111-203; title X, 124 Stat. 2092 (2010)., codified as 15 U.S.C. § 1692 –1692p. https://www.ftc.gov/system/files/documents/plain-language/fair-debt-collection-practices-act.pdf

Selene believes that if the FCC adopts the above suggested recommendations that the TCPA will continue to protect consumers against unwanted telemarketing calls, better shield well-meaning companies from costly and unintended litigation, and help to ensure that consumers are not deprived of beneficial and expected communication. Selene also believes that the TCPA should be strictly interpreted and focused on deterring unwanted telemarketing calls that are made by telemarketers who do not have an existing relationship with those being called. Furthermore, Selene is against any interpretation of the TCPA that would create additional litigation opportunities that could be brought against non-telemarketing companies as that was not the initial intent of the TCPA.

Lastly, Selene respectfully asks that the FCC use Selene as resource for any industry roundtable discussions that it deems necessary to better understand the potential impacts of future proposed changes might have on the mortgage servicing industry. Should you have any additional questions or concern, please do not hesitate to contact Selene at 904-515-0639 or Legal@selenefinance.com.

Respectfully submitted,
Selene Finance LP